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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 428

KOMNENUS M. SOUKARAS, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

KOMNENUS M. SOUKARAS
Petitioner
2310 N. W. 15th Street
Miami 35, Florida

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays for a writ of certiorari to the United States Court of Claims to review the judgment of that Court entered on May 1, 1956 dismissing the petition for alleged lack of jurisdiction.

Opinion Below

The opinion of the Court of Claims of May 1, 1956 is reported at 140 F. Supp. 797, and a copy thereof is appended hereto.

Jurisdiction to Review

The final judgment of the Court of Claims dismissing the petition was entered on May 1, 1956. Petitioner's motions for a rehearing and for leave of court to amend petition to conform to the evidence were denied without opinion on July 12 and 13, 1956, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

Question Presented

Whether the Court of Claims, created by statute, is within its powers to choose to abdicate its judicial functions as a court by holding that it allegedly has no jurisdiction to try a particular case, one as to which the statutes have otherwise given it exclusive jurisdiction, said court supporting its decision by adopting for the first time in its history a new doctrine which adversely affects the statutory rights of all servicemen of the armed forces of the United States, and which doctrine on its very face runs counter to its own rules of court, the statutes, law and equity, its own past decisions and the decisions of the Supreme Court, all of which authorities point out that the said court does in fact have jurisdiction which it apparently is unwilling to exercise thus leaving plaintiff below and an unlimited number of future complainants without a remedy whatever.

For the first time in its history, the Court of Claims has seen fit to adopt an iniquitous, repugnant, and unorthodox doctrine to the effect that "*fraud sounds in tort*, and the court has no original jurisdiction of tort actions". (Emphasis supplied). The effect of this novel doctrine (the obnoxious part is that which says that "fraud sounds

in tort") is to open wide the gates of abuse by the agents of the respondent of varying character and ability to commit at will any type of fraud upon the combat veterans of the United States with immunity, and to close shut the doors of the courts for lawful statutory relief. Both of the words "fraud" and "tort" are without exact legal definition. Obviously they leave the door wide open to abuse of sound judicial discretion any time the particular court wants to do it.

Statutes grant disability retirement pay to a veteran provided his disability is service-connected. If the respondent through admitted fraud, through statutory fraud, unlawfully determines that the veteran's disability was not service-connected, the veteran is precluded from obtaining relief in the Court of Claims, which otherwise has statutory exclusive jurisdiction of the subject matter, because of the afoersaid new doctrine.

Statutes, Rules of Court, and Regulations Involved

The basic statute governing retirement for disability of Reserve officers is Section 5 of the Act of April 3, 1939 (53 Stat. 557), as amended by the Act of December 10, 1941 (55 Stat. 796), 10 U.S.C. 456, which reads as follows:

> "All officers * * * of the Army of the United States, * * * if called or ordered into active military service by the Federal Government for extended military service in excess of thirty days, * * * and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same

> pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers * * * of corresponding grades and length of service of the Regular Army * * * ".

The basic regulation governing the determination for line of duty disease or injury is paragraph 63(c) of Army Regulations 40-1025, issued December 12, 1944, which reads as follows:

> "General inference. —Lacking evidence to the contrary, a disease or injury of a militarized person will be presumed to have been service-connected, and, therefore, in line of duty."

Army Regulations (and their counterpart the Navy Regulations) have the force of law. —*Spencer v. United States*, 121 C.Cls. 558, and cases cited. The basic regulation prohibiting the defendant from indulging in presumptions of predisposition or heredity is "The Manual of the Bureau of Medicine and Surgery, Part III, Chapter 2, Section III, paragraph 3222.1", cited in *Lemly v. United States*, 109 C.Cls. 760, which reads as follows:

> "* * * Any presumption as to predisposition or heredity or congenital origin has no place and should not be given consideration in deciding the question of whether or not a particular disability occurred subsequent to enlistment and in line of duty, where said disability is discovered for the first time while the individual is in a duty status subsequent to his enlistment * * *".

The basic Court of Claims Rules involved in this case, which have the force of law and are binding on the Court, read as follows:

> Rule 8(a)(2): "A party may also state as many separate claims or defenses as he has, regardless of consistency and whether based on *legal or on equitable grounds or on both*". (Emphasis supplied).
>
> Rule 9(b): "In all averments of *fraud*, the circumstances constituting *fraud* shall be stated with particularity". (Emphasis supplied).

Statement of the Case

Plaintiff sued in the United States Court of Claims to recover disability retirement pay to which he is entitled by the statutes and regulations for World War II service as an Army Reserve officer. The basis of plaintiff's petition in the court below was that respondent's determination that plaintiff's disability was not service-connected was procured by fraud. Jurisdiction of the Court of Claims is conferred by 28 U.S.C. 1491. This jurisdiction is exclusive.

Plaintiff accepted a commission as a 2nd Lieutenant, U.S.A.R., in 1928. He entered on extended active duty as a Captain in 1940. Between 1928 and 1940, a period of 12 years, plaintiff had summer tours of active duty every year in that intervening period. At each of these tours of active duty plaintiff was physically examined, according to law, and found to be in sound health. When plaintiff entered on extended active duty in 1940, he was again thoroughly examined and again found to be in sound health. Four years after plaintiff's entrance on extended

active duty and while serving overseas in the year 1944, plaintiff contracted for the first time the incurrable disease of hay fever in a severe form. The disease is incurrable and seasonal in nature arising from external causes. The following year plaintiff was disabled from the recurrence of the said disease and was evacuated by hospital ship to the United States for treatment. He was subsequently retired for permanent disability without pay.

Plaintiff's initial overseas medical records clearly, officially, and unmistakably state that plaintiff acquired this disease in the line of duty. On subsequent dates, at some other medical installations, defendant's agents fraudulently falsified plaintiff's subsequent medical records by entering the abbreviation EPTS, meaning Existed Prior to Service. This was unknown to plaintiff until after suit was filed in the court below, which forced the defendant to furnish official copies of plaintiff's medical record. This evidence, discovered after suit was filed under the conditions stated, necessarily was not incorporated in the original petition, but was brought to the attention of the Court at the hearing below of April 1, 1956. On the basis of the said entry of EPTS, the Retiring Board and the Secretary of War denied plaintiff his retirement benefits which the statutes and regulations have otherwise granted him. The reason why defendant deliberately falsified plaintiff's medical records was because it unlawfully subscribed in the subsequently discredited theory that hay fever is a hereditary disease, congenital in origin. This theory has now been shown to be untenable by top allergy experts in this country who have concluded that hay fever is an infectious disease acquired like any other disease and that every human being is a potential victim of it. Moreover, defendant's theory is not applicable to plaintiff because none of his ancestors

or relatives, however remote, has ever had this disease. But more important is the fact that the law strictly forbids the defendant from indulging in "any presumption as to predisposition or heredity or congenital origin" in determining whether a particular disability is service-connected. Clearly then the said action of the defendant was basically unlawful and fraudulent.

This type of fraud is not easily ascertainable. Plaintiff did not know and would have never known of the fraudulent falsification of his medical record if he had not filed suit forcing the defendant to disclose all the facts. The initial reason that motivated plaintiff to file suit was his fortuitous and unexpected discovery of newspaper reports that top allergy experts consider the theory of heredity in hay fever as untenable. This forced plaintiff to research the subject thoroughly thus uncovering for the first time defendant's fraud in all its nakedness. Up to then plaintiff had no concrete reason to doubt defendant's superior knowledge although he was at all times conscious of the wrong done him.

Plaintiff filed suit charging the defendant with arbitrary, unlawful, and fraudulent action, the charges being specified with particularity conforming to Court of Claims Rule 9(b) requiring that "In all averments of fraud, the circumstances constituting fraud shall be stated with particularity".The defendant countered with a motion to dismiss on the grounds of (a) the 6-year statute of limitation and (b) the petition sounds in tort. Plaintiff below filed a brief overwhelmingly disproving defendant's contentions, and among others filed certain exhibits attached to the original of his brief consisting of official copies of his medical record showing defendant's falsification of same.

At the hearing below, plaintiff brought this evidence to the attention of the court. Defendant admitted the fraud, but insisted that even so the petition is barred by the 6-year statute of limitation, and also that fraud is an equitable principle and that the Court does not have equity jurisdiction. The Court responded that the statute of limitation is suspended until the discovery of the fraud, that the Court does have equity jurisdiction, and in other ways appeared to react favorably to plaintiff. It is elementary that defendant admitted its fraud by its motion to dismiss, that the statute of limitation is suspended until the discovery of the fraud, and that fraud comes under the jurisdiction of equity. The Court, however, in its Opinion saw fit to further confuse the matter by placing it under a false light. In its Opinion of May 1, 1956, a copy of which is appended hereto, it: (a) Adopted defendant's statement of facts which in a significant measure contains inaccuracies, distortions, and significant omissions as opposed to plaintiff's petition admitted by defendant by its motion to dismiss. (b) Went beyond the elementary rules of law in such cases where the legal position of the litigants is determined by the record, in this case fraud was charged and admitted, by holding that "This action is founded on the statute and not on fraud. If founded on fraud, it would sound in tort, and it is clear that this court has no original jurisdiction of tort actions. Petition * * * is barred by the 6-year statute of limitations".

Plaintiff filed a motion for a rehearing setting out 23 major errors of law, an unusually high number for any court to make. Plaintiff formally invoked the equity jurisdiction of the court below. And further wishing to restore the case in its proper light, plaintiff filed a motion for leave of court to amend petition to conform to the evidence,

the evidence that was brought before the court below of defendant's statutory fraud, the unlawful and fraudulent falsification of plaintiff's medical records by defendant. Plaintiff below actually filed an amended petition containing the necessary allegations of the aforesaid evidence, the petition furthermore being now scrupulously devoid of any other matter that could raise even the remotest or faintest excuse that it sounds in tort, but at the same time anchoring more securely the charges of fraud, the fundamental basis of the suit. The court below overruled plaintiff's motions without opinion. An opinion usually accompanies the denial of such motions, but in this case plaintiff brought to the attention of the court certain of defendant's more glaring and unwarranted fabrications opposed by the court record, which if adopted by the court would have further unnecessarily confused the issues, as was previously done when the court below uncritically adopted defendant's statement of facts contrary to basic law that the allegations of fact are admitted by a motion to dismiss.

Reasons for Granting the Writ

This is not just a disability retirement pay case.

The ruling below jeopardizes the present and future statutory rights of every combat veteran of the United States of today and tomorrow. It gives carte blanche to the agents of respondent of varying ability and character to commit frauds at will with immunity. It shuts off all court relief. It sets the clock back to archaic ideas of law and justice repudiated by the Congress. It contravenes the express intent of the Congress. In a sense it undermines the Constitution of the United States guaranteeing the rights of all. It undermines confidence in the federal courts. It is

a blow to American jurisprudence and basic concepts of law and justice. It is a misconceived judge made law which finds precedence nowhere. It affects the dignity and prestige and honor of the Supreme Court as a supervisory court. It presents a question of important federal law, of legal and public importance, which calls for resolution by this Court.

The ruling of the court below on its very face runs counter to its own rules of court which have the force of law and are binding on the court, counter to the statutes, law and equity, its own past decisions and the decisions of the Supreme Court, all of which urgently call for the supervisory powers of the Supreme Court.

Argument and Authorities

The one and only reference cited by the court below for its new revolutionary doctrine that "fraud sounds in tort", is the case of *Martilla v. United States*, 118 C.Cls. 177. However, a reading of this case clearly reveals that the word "fraud" or any such similar word does not occur therein even once. The conclusion is inescapable that whatever this case stands for, it nowhere supports the proposition that "fraud sounds in tort".

The words "fraud" and "tort" do not have exact legal definitions. But throughout the legal history of this country, there are certain established sign posts and guides to guide the courts. These were almost exhaustively brought to the attention of the court below which ignored them.

It is generally conceded that an exact definition of "fraud" and of "tort" is indeed impossible. The broadest

definition of fraud and of tort is a "wrongful act", a legal one for tort and an equitable one for fraud. Every case brought to the court below was of course to redress some "wrong", some "wrongful act". The court below does not take the extreme position that virtually every one of its past decisions is null and void for acting to redress a "wrong", which broadly means a tort. And never before has it ever taken the other extreme position that it now takes that "fraud sounds in tort". Certainly not. Tort calls for damages. Fraud calls for restoration of rights. *Plaintiff below has not asked for damages. He has merely asked for restoration of his rights.* Fraud cannot possibly sound in tort as to deprive the court of jurisdiction, as it is clearly evidenced by its own rules of court which have the force of law and are binding on the court. Rule 9(b) clearly states: "In all averments of fraud, the circumstances constituting fraud shall be stated with particularity". This is clear proof that the Court of Claims does indeed have jurisdiction to try fraud cases. It has actually tried quite a number in the past, as shown in the United States Court of Claims Digest, Vol. 3, at p. 574, under the heading of Fraud. That the court below has been quite conscious in the past that it does have jurisdiction to try fraud cases is further shown by its various holdings that: "The findings of the Secretary of War on a man's eligibility to retirement pay was final and could not be reopened, except in the case of *fraud*, * * *". (Emphasis supplied). —*Spencer v. U.S.*, 121 C.Cls. 558, cert. den. 344 U.S. 828; *Carlin v. U.S.*, 121 C.Cls. 643; *Campbell v. U.S.*, 132 F.Supp. 225; *Girault v. U.S.*, 135 F.Supp. 521; *Capps v. U.S.*, 137 F.Supp. 721.

Fraud is an equitable principle and the Court of Claims does have equity jurisdiction, as shown by its holding:

"Prior to the passage of the Tucker Act, 24 Stat. 505, this court was without equity jurisdiction. But by that statute it was invested with equity jurisdiction 'when the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable' ". —*Milliken Imprinting Co.*, 41 C.Cls., 202 U.S. 168.

That the Court of Claims does have equity jurisdiction is further shown by reference to the Court of Claims Digest, Vol. 3, at p. 490, under the heading "Equity", and cases cited. The following court's holding is also significant: "Where a party has been deprived of his right of action by *fraud*, accident, or mistake, or inadvertence, and has no remedy at law, a court of equity can grant relief". (Emphasis supplied.) —*Murray v. U.S.*, 46 C.Cls. 94.

That the Court of Claims does have equity jurisdiction is further shown by its Rule 8(a)(2), having the force of law and binding on the court, which says: "A party may also state as many separate claims or defenses as he has, regardless of consistency and whether based on *legal or on equitable grounds or on both*". (Emphasis supplied).

The aforesaid Rules 8(a)(2) and 9(b) clearly show that the new doctrine that "fraud sounds in tort" is untenable and falls of its own weight, unless the court below intended the said rules to be but legal traps, an unthinkable conclusion. Rules of court have the force of law and are binding upon the court as shown by the following cases: "A rule of court authorized by statute has the force of law". —*Weil v. Neary*, 278 U.S. 160, 49 S.Ct. 144, 73 L.Ed. 243. "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon

parties to an action, and it cannot be dispensed with to suit the circumstances of any particular case". —*Rio Grande Irrig. & Colonization Co. v. Gildersleeve*, 174 U.S. 603, 19 S.Ct. 761, 43 L.Ed. 1103.

The court below cannot change the nature of the claim below at will and neither can it refuse jurisdiction to try it as shown by the following instructive cases: "It is nature of plaintiff's claim, not character of defendant's defense, which determines jurisdiction of Court of Claims". —*Eastport S.S. Co. v. U.S.*, 131 C.Cls. 210, 130 F.Supp. 333.

"A court cannot refuse to exercise a power which the Constitution and the laws have clothed it". —*Meyer v. Tupper* (The St. Lawrence) 1 Black 522, 17 L.Ed. 180.

The Supreme Court has the power to enforce the laws relating to jurisdiction as shown by the case following: "The Federal Supreme Court does not prescribe the jurisdiction of courts, federal or state, *but only gives effect to it as fixed by law*". (Emphasis supplied). —*Henry v. Dick Co.*, 224 U.S. 1, 32 S.Ct. 364, 56 L.Ed. 645.

"Having consented to suit, the United States should be held to have placed itself in the position of an ordinary litigant before the court, to whom the rules of civil procedure apply". —*Mosseller v. U.S.*, C.C.A. 2d, 158 F. 2d 380, and cases cited.

"A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of a Federal court which is not defeated by the way the court may chance to decide an issue as to legal sufficiency of the facts alleged to constitute the cause of action". —*Binderup v. Pathe Exchange*, 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308.

"In equity cases the Supreme Court has the right to review the facts as well as the conclusions arising out of them". —*Ayres v. U.S.*, 44 C.Cls. 110.

A knowingly false entry in a United States document is classified as fraud by statute, as indicated in the case of *U.S. v. Myers*, 131 F.Supp. 525.

"Amendment to conform to evidence must be permitted with great freedom. Federal Rules Civ. Proc. rule 15(a), 28 U.S.C.A.". —*Matter of Timberline Lodge, Inc.*, 139 F.Supp. 13.

"Where Court of Claims sustained motion to dismiss certain claims on ground that they accrued more than 6 years prior to filing of petition but it was apparent that facts were considered by Court of Claims and counsel that were not in the pleadings, and court's opinion and judgment took cognizance of such facts, judgment would be vacated by Supreme Court and cause would be remanded. 28 U.S.C.A. 2501". —*Std.-Vacuum Oil Co. v. U.S.*, 115 C.Cls. 843, 339 U.S. 157, 70 S.Ct. 545, 94 L.Ed. 731.

The 6-year statute of limitation is not so sacrosanct that it cannot be set aside when the case merits it as was repeatedly done by the court below in the cases of *Capps v. U.S.*, 137 F.Supp. 721; *Goodwin v. U.S.*, 118 F.Supp. 369; and *Uhley v. U.S.*, 121 F.Supp. 674.

Plaintiff below is precluded by the statutes from resorting to any other forum but the Court of Claims, which was given exclusive jurisdiction, for redress of the wrong done him. He cannot sue the United States for tort. The Federal Tort Claims Act, 28 U.S.C. Sections 2671 et seq., contains

an exception excluding claims arising out of combat activities of the military and naval forces. 28 U.S.C., Section 2680j. "The Federal Tort Claims Act does not cover claims of members of the armed forces who sustain service-connected injury while on active duty". —*Feres v. U.S.*, 340 U.S. 135.

The court below has now shut also the doors of the Court of Claims, an unthinkable result. The basic doctrine that for every wrong there is a remedy no longer holds. A disabled veteran of the United States may be deprived of his statutory rights, deprived of relief in court, by this new doctrine of the court below. All defendant has to do is to enter in the veteran's medical records the phrase EPTS without factual support, the gist of the case below. The fact that such a knowingly false entry in a United States document is classified as fraud by statute was ignored by the court below.

Conclusion

It is respectfully submited that this case calls for the exercise of supervisory powers by this Court and that the writ sought should be allowed.

Respectfully submitted,

KOMNENUS M. SOUKARAS
Petitioner
2310 N.W. 15th Street
Miami 35, Florida

September, 1956

APPENDIX

In the United States Court of Claims

No. 346-55

(Decided May 1, 1956)

KOMNENUS M. SOUKARAS v. THE UNITED STATES

Mr. Komnenus M. Soukaras, pro se.

Mr. George L. Ware, with whom was *Mr. Acting Assistant Attorney General George S. Leonard*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED PETITION

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiff, presently major, USAR honorary, formerly major, AUS, claims he should have been retired from active duty by reason of physical incapacity due to active service. This suit is for (1) active-duty pay from the date he was released from active duty to the date he accepted an honorary reserve commission, (2) retired pay thereafter, and (3) interest.

Defendant has filed a motion to dismiss plaintiff's amended petition on the grounds (1) the petition shows on its face that it is barred by the statute of limitations, 28 U. S. C. § 2501, and (2) it appears on its face that the petition is based on the tort and, therefore, is barred by 28 U. S. C. § 1491 (5), and 28 U. S. C. § 1504.

Title 28 U. S. C. § 2501 provides, in pertinent part, as follows:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

Title 28 U. S. C. § 1491 (5) provides as follows:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

* * * * *

> (5) For liquidated or unliquidated damages in cases not sounding in tort.

Title 28 U. S. C. § 1504 provides as follows:

> The Court of Claims shall have jurisdiction to review by appeal final judgments in the district courts in civil actions based on tort claims brought under section 1346 (b) of this title if the notice of appeal filed in the district court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims.

The fact alleged in plaintiff's petition are summarized as follows: Plaintiff entered military service June 5, 1928, as second lieutenant, Signal Corps USAR, and by June 16, 1942, had become major, Signal Corps, AUS. His final tour of active duty was from September 23, 1940, to Febru-

ary 7, 1947. On April 2, 1948, he accepted a commission as major, USAR honorary. While on active duty in England in May 1944, plaintiff experienced hay fever in severe form but defendant negligently failed to provide him treatment and in the exercise of culpable negligence adopted a false, lazy, and convenient theory of his illness. In 1945, while on active duty in Germany, plaintiff again fell victim to hay fever in a more severe and disabling form, and defendant again failed to provide him treatment. Plaintiff was hospitalized in Germany on June 1, 1945, and successively on June 2, 8, and 28, 1945, was processed through hospitals of defendant in France ending July 10, 1945, on defendant's hospital ship bound for the United States. On July 13, 1945, defendant, for the first time, provided medical treatment. Because of defendant's culpable negligence in failing to rapidly evacuate plaintiff, his incapacity became permanent.

On October 29, 1945, plaintiff appeared before the First Army Retiring Board at Camp Pickett, Virginia, which found plaintiff's disability originated about 1927, and became manifest in May 1944. It recommended permanent limited service.

On January 30, 1946, plaintiff appeared before the Second Army Retiring Board at Staunton, Virginia, which recommended temporary limited service with reexamination in 6 months.

On October 25, 1946, plaintiff appeared before the Third Army Retiring Board at Staten Island, New York. This board found plaintiff permanently incapacitated for active service because of hay fever which originated about 1927, that the incapacity began June 1, 1945, but was not caused

by, or the result of, an incident of service, or permanently aggravated by service beyond normal progress, nor was it incurred in combat, or by explosion of an instrumentality of war in line of duty. Plaintiff was recommended for permanent limited service. The Secretary of War approved the findings of the Board by letter to plaintiff dated December 6, 1946, over the signature of the Adjutant General, which advised plaintiff that the War Department considered him permanently physically incapacitated from active military service, and that he was not entitled to retirement pay benefits as his incapacity was not incurred in line of duty while on active duty as a commissioned officer.

On December 9, 1946, plaintiff was placed on terminal leave and reverted to inactive status effective February 7, 1947, because of physical incapacity. On that date, pay and allowances ceased. This was about 8½ years before this petition was filed. On April 2, 1948, plaintiff accepted a commission as major, USAR. On December 5, 1952, the Army Disability Review Board approved the findings of the retiring board. On November 24, 1953, the Army Board for Correction of Military Records apparently denied plaintiff relief. Petition herein was filed September 13, 1955, and amended September 20, 1955. Therein plaintiff claims the findings of the Army Disability Review Board were arbitrary, capricious, unlawful, fraudulent, unsupported by evidence and contrary to regulations. Plaintiff also claims the defendant, from May 1944 to February 7, 1947, in various ways deceived plaintiff about his illness and condition, previous history of health and the significance of statements made by plaintiff during examinations, all for the purpose of avoiding its guilt, negligence, and ignorance.

This court has, on numerous occasions, held in similar cases that a cause of action first accrues within the meaning of 28 U. S. C. § 2501, *supra*, when the Secretary of War approves the findings of the retiring board. *Odell* v. *United States*, No. 145-55, decided April 3, 1956; *Girault* v. *United States*, No. 50474, decided November 8, 1955.

This court has further held that resort to the disability review board and/or the Army Board for Correction of Military Records is a permissive administrative remedy and does not toll the statute of limitations, *supra*. *Girault v. United States, supra; Cuiffo v. United States*, 131 C. Cls. 60.

However, plaintiff says the Army was guilty of a fraud upon him and therefore his action is not barred by the 6-year limitation statute.

A careful scrutiny of the petition reveals that plaintiff charges the Army retiring board with deceit, in that the Army was deceiving itself through ignorance of the nature of his disease; *i. e.*, that hay fever is a hereditary disease, and in turn deceived plaintiff. Plaintiff further says the fact that defendant has granted others retirement pay who had contracted hay fever and refused it to him is *prima facie* evidence of fraud. Plaintiff further alleges in rhetorical paragraph 15 of his petition that "Even today 'hay fever' is not an absolutely scientific definition." Again, in rhetorical paragraph 17 of the petition, plaintiff alleges "* * * hay fever is not an *exclusively* hereditary disease but on the contrary that it *can* be acquired like any other disease." (Italics supplied.)

An essential element required to sustain an action for

deceit is, generally speaking, that a representation was made as a statement of fact, which was untrue, and known to be untrue by the party making it. 23 Am. Jur. 773. The principle is fundamental that fraud cannot be predicated upon the mere expression of an opinion.

Thus we conclude that at most the action or lack of action on the part of the Army doctors was a mistake rather than a fraud. If it was a mere mistake, it could not amount to fraud or give rise to suspicion of fraud. *Martin* v. *Chandis Securities Co.*, 33 F. Supp. 478, 480, and cases cited therein.

Plaintiff's other allegations that defendant was culpably negligent in failing to provide medical treatment, was ignorant of the disease, was negligent in failing to rapidly evacuate him, failed to provide treatment facilities, or treatment, deceived the plaintiff, knew nothing about treatment for hay fever, put words in plaintiff's mouth and twisted them around to fit defendant's incompetent theories, sound in tort rather than pleading an actionable fraud. Furthermore, it is a familiar principle of equity jurisprudence that where a suit is founded on fraud the statute of limitations does not begin to run until the discovery of the fraud. *Green* v. *United States*, 17 C. Cls. 174. But this action is founded on the statute and not on fraud. If founded on fraud, it would sound in tort, and it is clear that this court has no original jurisdiction of tort actions. *Martilla* v. *United States*, 118 C. Cls. 177.

In conclusion, since there is no valid allegation of fraud in the petition, and since this court does not have original jurisdiction of tort actions, plaintiff's cause of action as alleged accrued on December 6, 1946, when the Secretary

of War approved the findings of the retiring board. His petition was filed September 13, 1955, more than 6 years after the first accrual of his claim and is barred by the 6-year statute of limitaions, *supra*.

Defendant's motion is granted, and the petition is dismissed.

It is so ordered.

WHITAKER, *Judge*, and LITTLETON, *Judge*, concur.

MADDEN, *Judge*, and JONES, *Chief Judge*, concur in the result.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 428

KOMNENUS M. SOUKARAS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. i-vii) is reported at 140 F. Supp. 797.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956 (Pet. App. i-vii). Petitioner's timely-filed motions for a rehearing and for leave to amend his petition to conform to the evidence were denied on July 12 and 13, 1956, respectively (R. 147, 109). The petition for a writ of certiorari was filed on September 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioner's claim is barred by the six-year limitation provided by 28 U.S.C. 2501 for suits against the United States in the Court of Claims.

STATUTE INVOLVED

28 U.S.C. 2501 provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues.

STATEMENT

Petitioner, now a Major, USAR honorary, formerly Army of the United States, claiming that he should have been retired from active duty by reason of physical incapacity due to active service, brought this suit in the Court of Claims on September 13, 1955, for active duty pay from the date he was released from active duty to the date he accepted an honorary reserve commission, retired pay thereafter, and interest. The pertinent facts alleged in his amended complaint may be summarized as follows:

Petitioner entered military service June 5, 1928, as a second lieutenant, Signal Corps USAR, and by June 16, 1942, had become a major, Signal Corps, AUS (R. 1, 2). His final tour of active duty was from September 23, 1940, to February 7, 1947 (R. 2). On April 2, 1948, he accepted a commission as major, USAR honorary (R. 2).

While on active duty in England in May 1944, during the extensive preparation for the European invasion, petitioner wholly unexpectedly experienced hay fever in severe form (R. 3). Despite its mighty preparations

to meet all contingencies, the Government completely failed to foresee and provide for such a disease (R. 3). This failure constituted culpable negligence and the reason therefor was that the Government tenaciously and unexcusably held to a false, lazy and convenient theory of hay fever, which medical science in recent times has exploded as groundless, *i.e.,* that hay fever was a hereditary disease, that it was not acquired like any other disease and that there was no need to prepare for it (R. 3).

In 1945, while on active duty in Germany, petitioner again fell victim to hay fever in a more severe and disabling form (because the pollen concentration must have been very high) and the Government again failed to provide him treatment (R. 5). Since the war was then in a critical stage, petitioner suffered in silence but with the end of the war, petitioner allowed himself to be hospitalized in Germany on June 1, 1945, and successively on June 2, 8, and 28, 1945, was processed through Army hospitals in France (R. 5, 6). On July 10, 1945, petitioner was placed on the Government's hospital ship bound for the United States where the Government, for the first time, provided medical treatment. During the period of evacuation, the hay fever became so severe that petitioner's nostrils were dangerously near to being completely plugged up, preventing effective breathing and bringing petitioner to near suffocation (R. 6). The Government's culpable negligence in failing rapidly to evacuate petitioner, among other factors, made petitioner's physical incapacity permanent (R. 6).

On October 29, 1945, petitioner appeared before an Army Retiring Board at Camp Pickett, Virginia, which

found petitioner's disability originated about 1927, had become manifest in May 1944, and recommended permanent limited service (R. 7). On January 30, 1946, petitioner appeared before a second Army Retiring Board at Staunton, Virginia, which recommended temporary limited service with re-examination in six months (R. 7).

Thereafter on October 25, 1946, petitioner appeared before a third Army Retiring Board at Staten Island, New York (R. 7). This Board found that petitioner was permanently incapacitated for active service because of hay fever which originated about 1927, that the incapacity began June 1, 1945, but was not caused by, or the result of, an incident of service, or permanently aggravated by service beyond normal progress, nor was it incurred in combat, or by explosion of an instrumentality of war in line of duty (R. 7-8). The Board recommended that petitioner be considered for permanent limited service. On December 6, 1946, the Adjutant General advised petitioner that the Secretary of War approved the findings of the Board, that the War Department considered him permanently physically incapacitated for active military service, and that he was not entitled to retirement pay benefits as his incapacity was not incurred in line of duty while on active duty as a commissioned officer (R. 8). Pursuant to this finding, petitioner was, on December 9, 1946, placed on terminal leave and reverted to inactive status, effective February 7, 1947, because of physical incapacity, and all his pay and allowances ceased (R. 8). On April 2, 1948, petitioner accepted a commission as Major, Honorary USAR.

Subsequently on December 5, 1952, the Army Disa-

bility Review Board approved the findings of the Retiring Board. These findings of the Board, petitioner claims, were "arbitrary, capricious, unlawful and fraudulent, in the extreme" in that they were entirely unsupported by any evidence of probative value and contrary to regulations (R. 9). On November 24, 1953, the Army Board for Correction of Military Records apparently denied petitioner relief.

The complaint further alleged that from June 1, 1945 to February 7, 1947, the Army doctors in various ways deceived petitioner about his illness and condition, previous history of health and the significance of statements made by petitioner during examinations, all for the purpose of avoiding its guilt, negligence, and ignorance (R. 10-12). The complaint also claimed that the "Army retiring board [acted] with deceit, in that the Army was deceiving itself through ignorance of the nature of his disease; *i.e.,* that hay fever is a hereditary disease, and in turn deceived [petitioner]" (Pet. App. v). Petitioner also charged that the respondent had granted retirement pay to others who had contracted hay fever and that its refusal in his case was *prima facie* evidence of fraud (R. 12).

The Government moved to dismiss the complaint on the grounds that (1) it was barred by the six year limitation provision contained in 28 U.S.C. 2501, *supra,* p. 2, and that the petition, being based on tort, was beyond the jurisdiction of the Court of Claims under 28 U.S.C. 1491(5) (R. 17).[1] The Court of Claims, holding

[1] 28 U.S.C. 1491 provides:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

* * * * *

(5) For liquidated or unliquidated damages in cases not sounding in tort.

that petitioner's claim first accrued, within the meaning of 28 U.S.C. 2501, on December 6, 1946, the date on which the Secretary of War approved the findings of the retiring board, dismissed petitioner's complaint as time-barred (Pet. App. 7).

ARGUMENT

The single question presented in this case is whether petitioner's claim for disability pay was barred by limitations. The Court of Claims properly dismissed the complaint as time-barred and applied established principles in a wholly unexceptionable way to petitioner's constitutional claim. Review by this Court is therefore unwarranted.

1. The Court of Claims has consistently held that a cause of action in a retirement pay case first accrues within the meaning of 28 U.S.C. 2501 when the finding of the retiring board is approved by the Secretary of War. *Arnold* v. *United States*, 129 F. Supp. 747 (C. Cls.); *Gerault* v. *United States*, 135 F. Supp. 521 (C. Cls.). In this case, such approval occurred on December 6, 1946, more than 8½ years before petitioner's suit was filed in the Court of Claims. The fact that petitioner sought administrative relief from the Disability Review Board and later the Army Board for Correction of Military Records did not toll the running of the statute of limitations since such administrative appeals were permissive only and not prerequisites to filing a suit in the Court of Claims. *Gerault* v. *United States*, *supra*; *Griffin* v. *United States*, 131 C. Cls. 60, 127 F. Supp. 946; *Manhattan* v. *United States*, 128 C. Cls. 41, 122 F. Supp. 268. See *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 636; *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274, 280-282.

2. Petitioner seeks to avoid this rule by urging the Government's doctors were guilty of fraud and consequently that the running of limitations was tolled until his discovery of the fraud. Essentially, the "fraudulent" acts complained of are that the Army doctors and the retiring boards deceived themselves into believing that hay fever is hereditary and in turn deceived petitioner into believing that to be the fact. As was said by the Court of Claims (Pet. App. vi), there are no facts alleged which even give rise to a suspicion of true fraud by any of the agents of the Government. To sustain a finding of fraud and deceit, the allegations would have to show at least that there had been a false representation as to a material fact, that the representation was known to be false by those making it, and that it was made with an intent to deceive. See *Pence* v. *United States,* 316 U.S. 332, 338. Petitioner's assertions, both here and in the court below, do not meet these requirements. Despite his derogatory characterization, the complaint at most indicates that there is a difference of opinion among medical authorities as to the cause and nature of hay fever and that the Army doctors and boards have adhered to a view contrary to that which petitioner would prefer them to adopt. Certainly, in these circumstances the view adopted by the Army doctors does not constitute a conscious deception.

3. Petitioner's further contention that the court below improperly denied that it had jurisdiction of his claim because an action based on fraud sounds in tort (Pet. 2) is equally unsound. The court found, first, that the facts alleged did not constitute fraud and, secondly, that this suit was based on the retirement statute rather than on fraud (Pet. App. vi). In passing,

the court did observe that if petitioner was basing his suit on deceit it would sound in tort. And it is settled that the Court of Claims lacks original jurisdiction over tort claims. 28 U.S.C. 1491, *supra*, p. 5, fn. 1; *Martilla* v. *United States*, 118 C. Cls. 177.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1956

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IN THE

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No. 428

KOMNENUS M. SOUKARAS, *Petitioner.*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY MEMORANDUM

KOMNENUS M. SOUKARAS
Petitioner
2310 N. W. 15th Street
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IN THE

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PETITIONER'S REPLY MEMORANDUM

Petitioner's reply memorandum is necessitated by: (a) The Government's obvious attempts at obfuscation, and (b) The Government's curious arguments unsupported by the record, unsupported by law. Each will be treated in turn.

The case is simply this:

Congress has passed a law granting veterans retirement pay and hospital benefits provided their disability is service connected (Pet. App. 3; R. 63).

Army regulations, which have the force of law, were issued providing for the determination of line of duty disease or injury (Pet. App. 4; R. 65-66).

To prevent any attempt at *fraud* on the veteran, naval regulations (equally applicable in this connection to the Army by court ruling) specifically prohibits retiring boards from indulging in "any presumption as to predisposition or heredity or congenital origin" in determining line of duty disease (Pet. App. 4; R. 66).

Because of countless examples of *fraud* and deceit practised upon thousands of veterans in the past by the Government, and to prevent future occurrences of *fraud*, the Congress in 1944 passed a law making any signed statement by a veteran against his own interest null and void and of no force and effect (R. 67). Evidently Congress felt that the Government has all kinds of records in minute detail, can make all kinds of medical tests, has at its disposal medical doctors of all types, and that clearly it is not honorable and decent to take undue advantage of battle fatigued veterans anxious to return home at the earliest, and deceive them as to the nature and origin of their disabilities and make them sign away their rights. It is clear then that by the said 1944 statute, the Congress being conscious that *fraud* had been practised in the past (Plt's Ex. 18; R. 60-62), it did all it could to prevent future fraud on the veteran. It appears, however, that bad habits once formed and long practised have a way of continuing, law or no law, and the Government is no exception, the Government which above all should be the prime and shining example of law observance.

Petitioner's disability was incurred overseas in line

of duty. His medical record clearly and officially and unmistakably so state (Plt's Ex. 2; R. 50). The Government's *official policy* at the time (not just some doctor or group of doctors) was, erroneously of course, that the incurable disease of hay fever is a hereditary disease, contrary to the general facts, contrary to the specific facts, and contrary to the specific prohibition of the law as indicated above (Plt's Exs. 8, 9, 10; R. 53-54). Pursuant to this official policy, the Government's agents knowingly and deliberately *falsified* petitioner's subsequent medical records (Plt's Exs. 3, 4, 5; R. 51-52) by entering the abbreviation EPTS, meaning existed prior to service (EPTI, existed prior to incidence, and EPTAD, existed prior to active duty, mean the same thing) (R. 51-52). Such a falsification of petitioner's medical records is a statutory fraud (*U. S. vs. Myers*, 131 F. Supp. 525), and not a mere opinion.

Petitioner was unaware of this falsification until after he filed suit in the court below forcing the Government to disclose all the facts. It was too late in time of discovery of this falsification to allege it in petitioner's amended petition, but he did present it as evidence to the court below at the hearing of April 1, 1956 (Pet. App. 6). On the basis of the falsified records, the army retiring board and the Secretary of War denied petitioner his statutory benefits.

When petitioner in the course of time and by a fortuitous circumstance discovered the Government's fraud, he filed suit in the court below, which has exclusive jurisdiction of the subject matter, basing his claim *both on the statute and on fraud*, a fraud that was admitted by the Government by its motion to dismiss. There was a hear-

ing on this motion at which petitioner brought to the attention of the Court the falsification of his records. The Court appeared to react favorably to petitioner and against the Government in the said open hearing. But in its Opinion, either by accident or design, it left out the real issues of the claim, it left out all mention of the falsification of petitioner's medical records by the Government, and contrary to the facts and the law found the Government's clear and inexcusable fraud to be but a mere opinion, and this without any semblance of a real trial of the facts; that the case was founded on the statute and not on fraud; that if founded on fraud it would sound in tort, and the Court has no original jurisdiction thereof, citing a most irrelevant case to support its position that fraud sounds in tort, the said case clearly not being based either on fraud or remotely supporting such a baseless proposition. Petitioner asked the court below for a rehearing and for leave to amend his petition to conform to the evidence. Both were denied.

Petitioner, conscious of the great injustice done him and of the obvious farsical day in court he had below and the great present and potential danger to all veterans and other servicemen of the United States of today and tomorrow, filed his petition for certiorari in the Supreme Court of the United States.

The Government filed its Brief In Opposition in which it has nothing to say concerning the real arguments of petitioner, nothing to say concerning petitioner's authorities on the law of the case, but parrot-like repeats the irrelevant and unsupported arguments of the court below, whose Opinion is based on material omissions from the record, a misconstruction of the case, and an obvious

attempt to exonerate a practice of clear fraud by the Government condemned and forbidden by the Congress by the above statute of 1944. The Martilla case cited by the court below merely stands for the known proposition that the Court of Claims does not have original jurisdiction of tort actions. The Martilla case, however, is not based on fraud, it clearly does not support the new doctrine of the court below that "deceit or fraud sounds in tort".

As matters now stand, the Government has been given court sanction to continue at will with immunity its practice of fraud by the mere expedient of inserting in the veterans' records the abbreviation EPTS (existed prior to service) without factual support and with no recourse of the veteran to the court for relief. The Government curiously contends that such an act is not a material misrepresentation done with intent to deceive and defraud and cites the Pence case. The court below, in effect, considers such an act a mere expression of opinion. According to the court below, murder is no longer murder depending on who is the culprit and who is the victim.

Respectfully submitted,

October, 1956

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